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Before the
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 712

IMPROVING REGULATION AND REGULATORY REVIEW

COMMENTS

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COMMENTS

Preliminary Statement

Samuel J. Nasca,^{1/} for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits these comments in response to the decision by the Surface Transportation Board (STB, or Board), dated October 5, 2011 (served October 12), 76 Fed. Reg. 63276-77. The Board's decision issued a Notice of Request for Comments (Notice), at the suggestion (but not direction) of E.O. 13563, 76 Fed. Reg. 3821-23 (Jan. 21, 2011), and E.O. 13579, 76 Fed. Reg. 41587-88 (July 14, 2011), with respect to improving federal regulation and regulatory review.^{2/}

Rail carrier employees have a direct interest in the regulatory performance of the Board. The STB is the principal federal government entity with economic oversight of the railroad industry. Proper regulations and regulatory administration have impor-

^{1/} New York State Legislative Director for United Transportation Union, with offices at 35 Fuller Road, Albany NY 12205.

^{2/} The Board is an independent regulatory agency, not directly subject to the two executive orders issued by the President. The UTU-NY review of E.O. 13563 indicates it was published January 21, rather than January 31, 2011, as otherwise mistakenly shown in the STB's Notice, at 1, and 76 Fed. Reg. 63276.

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tant impacts upon employee wages, working conditions, employment opportunities, safety, and railroad service in general. These matters are indicated by agency (STB and its ICC predecessor) decisions, as well as in the governing statutes, including the rail transportation policy. (49 U.S.C. 10101).

SUBJECTS FOR REVIEW

UTU-NY suggests certain aspects of regulation and regulatory review are appropriate for agency consideration at this time. Many of the UTU-NY thoughts involve substantive revisions which already are pending in various proceedings, and will not be repeated herein; indeed, UTU-NY and other employee organizations have participated and expressed views in a number of these proceedings, many of which are enumerated in the STB Chairman's May 18, 2011 communication to the President's Office of Information and Regulatory Affairs (OIRA).^{3/} Other suggested regulatory revisions have been mentioned in pleadings filed in this Notice proceeding by Association of American Railroads (AAR), and National Industrial Transportation League (NITL), dated November 17 and December 7, 2011, respectively, and summarized in the STB's decision in this Notice proceeding dated December 20, 2011 (served December 21). We believe any important substantive revision of STB regulations will likely require further notice and comment prior to finalization and/or promulgation, in order to enable due process and careful evaluation.

^{3/} The May 18, 2011 letter is referenced in the Board's Notice, at 2. 76 Fed. Reg. at 63276.

These comments are divided into three segments, the first dealing with suggestions that may require substantive rulemaking; the second and third segments set forth suggestions which may not require substantive rulemaking.

1. Open Proceedings and Transparency. The Board should revert to the open proceedings and transparency formerly associated with the predecessor ICC. To be sure, agency staff may be buffeted between the Members appointed by the President/confirmed by the Senate, on the one hand, and the practitioners pleading their views to the agency, on the other hand. The Members usually come to the agency with poorer knowledge of agency regulation and administrative law as between agency staff and agency practitioners.^{4/}

Advisory Committees. The Board should review the advisory committees, with a view to reduction in scope, more open procedures or, preferably, their outright abolition in several instances. Currently, many vacancies exist on the advisory committees, so that the process would not necessarily be disruptive. The advisory committees operate with extensive ex parte contacts between its members and selected STB staff personnel. The Railroad-Shipper Transportation Advisory Council (Ex Parte 526), asserts it is a "rail advocate," and submits legislative proposals to the Congress. Although RSTAC meetings are open to the public, participation is not. RSTAC was established by the Congress in ICCTA, 49

^{4/} In bygone years when the former ICC and the divisions thereof, held frequent public discussion and voting conferences among the Commissioners, the late Rupert L. Murphy often chided fellow agency members for failure to recognize that the practitioners as a group were far more knowledgeable of ICC lore, practice, and precedent than agency staff.

U.S.C. § 726. The Board should substantially reduce the current wide-ranging scope of RSTAC, and allow full public participation and attendance.^{5/}

The National Grain Car Council has recent statutory mention, 49 U.S.C. 11121(c), but was established much earlier in November 1993. (Ex Parte 519). National Grain Supply Conference, 10 I.C.C.2d 479 (1994).^{6/} The workings of the National Grain Car Council are fairly democratic, with its process open to all, including voluntary membership on the Council in earlier years. This UTU-NY commentor is unaware of any adverse views from rail carrier employees.^{7/}

The Rail Energy Transportation Advisory Committee (RETAC), was established by the STB in 2007. (Ex Parte 670). It is perhaps the most active of the advisory committees, dealing almost exclusively with the coal and ethanol industries. The meetings are public, but advance agenda and reports are not freely available to the public, and the public does not participate at the conferences, some of which have been conducted away from Washington, DC. There appear frequent ex parte communications between committee members and the

^{5/} RSTAC came from the Senate as designed for small shipper and small railroad policy matters. U.S. Senate, Comm. on Commerce, Science & Transp., Interstate Commerce Commission Sunset Act of 1995, S. Rep. 104-176, § 378, at 40. (Nov. 21, 1995). There was no comparable House provision. The Conference adopted the Senate language with technical modifications. However, the emphasis remained on small railroads and small shippers. H.Rept. 104-422 (Conf.), ICC Termination Act of 1995, at 235 (Dec. 18, 1995).

^{6/} The antecedent of Ex Parte 519, goes back further to Ex Parte 490, Grain Car Supply-Conference of Interested Parties, 7 I.C.C.2d 694 (1991).

^{7/} New York is not a major grain producing state, but it has been concerned with marketing operations.

STB's DFO. A major rail carrier employee organization expressed opposition to creation of RETAC.^{8/} It is suggested that RETAC be abolished. A far more open process should accompany discussions between the coal industry, rail carriers, and the regulatory agency.

The Toxic By Inhalation Hazard Common Carrier Transportation Advisory Committee (TIHCCTAC) was established in August 2010. (Ex Parte 698). However, the Board on October 14, 2010, suspended the member nomination process, citing concerns of antitrust and jurisdictional matters, among others. It is suggested that the TIHCCTAC proposal carries a number of features which have proved unsatisfactory in RETAC, such that TIHCCTAC should not be progressed, but rather should be abolished.

2. Published Decisions. The STB should promptly published its considerable backlog of non-printed decisions. The most recent volume is 8 years stale, 7 S.T.B., posting decisions covering the period June 2003-December 2004. It is important that the public be able to promptly ascertain the agency's critical precedent decisions. Prompt publication diminishes uncertainty and avoids unnecessary institution of proceedings, filing of pleadings or pleading contents. Reliance upon unpublished agency handbooks or computer retrieval is unsatisfactory for the public. In the ICC's early years, the public had difficulty researching ICC decisions, which necessitated Congressional action. Senate Resolution No. 17 (Dec. 6, 1927), was the result, with the creation and publication of the so-called Aitchison digest. This digest was in

^{8/} See: Ex Parte No. 670, UTU-GO/386, filed July 17, 2007.

addition to printed ICC decisions. At present, the STB is without publication of printed decisions, or a printed digest and, moreover, without a journal of record.^{9/}

3. Agency Secretary. The STB abolished its Secretary on October 5, 2009 (served Oct. 15). The office of Secretary had been vacant during the tenure of the preceding Acting Chairman. The Secretary should be restored. Virtually every major independent regulatory agency has a Secretary. Traditionally, the Secretary at ICC/STB has been outside the decisional process, who reports directly to the Chairman. Practitioners having special communications with the agency have done so through the Secretary. The alternative of making contact directly with an Office or Bureau staff member has presented difficulties with ex parte communications rules, and other procedures. The Secretary should be the chief administrative officer of the agency.^{10/} The Secretary has been termed, "(t)he power behind the throne." (*ibid.*, 165).

It is recommended the STB restore its public telephone directory, which had been published by the STB and its predecessor ICC for many decades. The directory also set forth the agency organization and staff titles. UTU-NY is unable to ascertain any rational basis for elimination of the directory. If the agency is

^{9/} Private companies have assisted in giving widespread attention to agency decisions. However, the former ICC staff directed removal of Traffic World facilities, effective September 17, 1997. See: Traffic World, Sept. 10, 1979, at 27. Today, the STB does not have a publication of record, unlike sister agencies in transportation.

^{10/} See: Miller, C.A., The Lives of the Interstate Commerce Commissioners and the Commission's Secretaries, 165-75 (ICCPA, 1946).

concerned with unauthorized staff communications, the proper channel is disciplinary, and not to cut-off directory publication. Other agencies make public their staff directories, e.g., Federal Communications Commission.

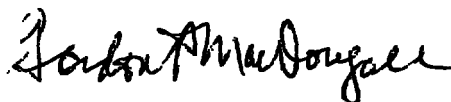
The matter of waivers of filing fees, in whole or in part, is critical. The Secretary is in a better position to consider waiver requests, than the Office of Proceedings, or another agency entity. Moreover, the waiver correspondence should be in the public docket, rather than privileged as at present.

The Secretary should schedule the release of decisions, at a set time or times during the day, rather than allowing irregular release of decisions and notices throughout the day, as at present. The former practice of scheduled releases placed the public and practitioners on a level playing field. Of course, exceptions can be made for truly emergency situations, with confirming telephone calls to all parties, if practicable.

The STB through its Secretary should administer agency staff participation in outside professional groups, particularly those groups which are accorded STB facilities. For example, one group, Association of Transportation Law Professionals (ATLP-DC), usually charges \$35 per non-member for luncheons, but this is reduced to \$15 per person for STB staff. Frequently, the topic under discussion at the luncheon may relate to STB activities. Some years ago, ICC/STB staff were not permitted to belong to the ATLP or its predecessor. Since that rule has been relaxed, some supervision appears necessary. The Secretary is an appropriate person for this task.

Finally, the Secretary should ensure that STB members in STB publications are labeled "Member" rather than "Commissioner." The ICC was abolished over 15 years ago. The agency staff may harbor resentment over the ICC's termination (which termination was attributable, in part, to staff actions), but it is time to deal with reality.

Respectfully submitted,



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